

REMARKS

The Office Action of September 17, 2008, has been considered by the Applicants. No claims are amended. Claims 1, 4-8, and 10-37 are pending. Reconsideration of the Application is requested.

Claims 1, 7, 12-17, 19-24, 27-30, and 35-37 were rejected under 35 U.S.C. 103(a) as allegedly being unpatentable over Ebert (GB 2151201) in view of Monte (U.S. Patent No. 5,578,336) and Brox (U.S. Patent No. 4,780,316).

Claims 1, 4-7, 11, 12, 15-17, 19-30, and 35-37 were rejected under 35 U.S.C. 103(a) as allegedly being obvious over Ebert in view of Cavanak (U.S. Patent No. 5,639,724) and Brox.

Claims 1, 4-7, 11, 12, 15-17, 19, 20, 22, 24-30, and 35-37 were rejected under 35 U.S.C. 103(a) as allegedly being obvious over Lech (U.S. Patent No. 6,027,746) in view of Cavanak.

Applicants traverse these three rejections together.

Applicants previously argued Brox did not provide a motivation to store the capsule for the claimed aging temperatures or time. In particular, Brox's storage temperatures of 30°C, 35°C, and 40°C were not "regular" or "normal", and were accidental, not intentional, and were intended to speed up the test results, not because such temperatures were typically used for storage.

Applicants also previously argued that Lech did not provide motivation to store the capsules at the claimed aging temperatures. Lech disclosed capsules that, when tested with a fill material that was not cacao butter, were stable for extended periods at room temperature, 30°C, 40°C, and 50°C. The overlap of these temperatures was merely coincidence.

In the Response to Arguments section of the Office Action, the Examiner replied that Weisman, Haan, and Metha taught storage conditions at 40°C, so that these storage conditions were well known in the art, not accidental. With respect to Lech, the Examiner also stated that coincidence or not, the teaching was there.

In response, Applicants submit that the Examiner's reasoning as to the claimed aging conditions relies on improper hindsight reasoning. Specifically, the Examiner ignores the fact that the selection of the aging temperature depends on the material to be aged. In the present claims, the material to be aged is a chocolate base comprising cacao butter. Neither Brox nor Lech teach aging conditions for cacao butter, and there is no indication that the conditions described in Brox and Lech apply to cacao butter.

It is well known that chocolate is ideally stored between 14°C and 17°C. Furthermore, storage conditions are distinctly separate from aging/crystallization temperatures. The specification clearly teaches that it is necessary to age the fill material at between 30°C to 40°C to obtain the Type V crystal. In addition, if the capsule is stored at 30°C to 40°C for several weeks, the crystals would change into undesirable Type VI crystals. One skilled in the art would thus differentiate between the terms "aging" and "storage" in relation to cacao butter.

The citation of Weisman, Haan, and Mehta is unfounded. One skilled in the art of pharmaceuticals (relevant to the capsule as a delivery system) and chocolate (relevant to the cacao butter) would not consider 30°C or 40°C to be regular and normal storage conditions. The Examiner appears to be merely selecting any reference that mentions these temperatures.

In addition, the references appear to prove Applicants' point that the storage temperatures of 30°C to 40°C were done only to speed up test results. Weisman, in column 2, lines 27-35, explains that tests using storage at 40°C and 75% humidity for three months extrapolate to two years at room temperature. Please note that Weisman, Haan, and Mehta all use the elevated temperatures in their examples only. In other words, the claimed range of 30°C to 40°C is used to speed up test results, not because such storage conditions are normal or regular.

The Examiner also referred to Ebert as disclosing the desirability of obtaining soft gelatin capsules having improved characteristics. However, Ebert's capsules do not comprise cacao butter, and Ebert's improved characteristics are not applicable to soft capsules comprising cacao butter as a fill material.

Applicants accordingly request withdrawal of these three § 103(a) rejections.

Claim 10 was rejected under 35 U.S.C. 103(a) as allegedly being obvious over Ebert in view of Monte or Cavanak and Nishizawa (U.S. Patent No. 4,463,024).

Claims 8, 12-16, and 31-34 were rejected under 35 U.S.C. 103(a) as allegedly being obvious over Lech, in view of Cavanak and Katsuragi et al. (U.S. Patent No. 5,756,543).

Claims 17 and 18 were rejected under 35 U.S.C. 103(a) as allegedly being obvious over Lech in view of Mehta (U.S. Patent No. 5,084,278).

These three rejections are traversed together.

These rejected claims all depend from claim 1. Applicants have argued above that the references do not suggest the desirability of the instant claims. Applicants do not separately argue the patentability of these claims.

Applicants request withdrawal of these three § 103(a) rejections.

CONCLUSION

For the reasons given above, it is respectfully submitted all pending claims (1, 4-8, and 10-37) are now in condition for allowance. Withdrawal of the rejections and issuance of a Notice of Allowance is requested.

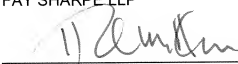
In the event the Examiner considers personal contact advantageous to the disposition of this case, she is hereby authorized to call Richard M. Klein, at telephone number 216-861-5582, Cleveland, OH.

Respectfully submitted,

FAY SHARPE LLP

December 17, 2008

Date


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